

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re MICHAEL D., a Person Coming  
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL D.,

Defendant and Appellant.

G049287

(Super. Ct. No. DL041566)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregory W. Jones, Judge. Affirmed as modified.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Robin Urbanski and Alastair J. Agcaoili, Deputy Attorneys General, for Plaintiff and Respondent.

Michael D. appeals an order continuing him a ward of the state under Welfare and Institutions Code section 602, based on a finding he participated in a conspiracy to challenge another to fight (Pen. Code, § 415, subd. (1)) for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)), and he engaged in street terrorism (Pen. Code, § 186.22, subd. (a)). The juvenile court granted Michael probation under various terms and conditions, including a prohibition against contacting or initiating contact “with the victims or witnesses of any offense alleged against you,” and a ban against the use or possession of “any dangerous, illegal or deadly weapons . . . .”

Michael claims these two probation conditions are unconstitutionally vague and overbroad because one fails to identify the persons he is prohibited from contacting, and the other fails to specify what constitutes a dangerous or deadly weapon. The Attorney General concedes the no-contact provision is unconstitutionally vague and must be modified. The ban on possession or use of dangerous or deadly weapons is not unconstitutionally vague because the phrase dangerous or deadly weapons is sufficiently precise for the minor to know what is required of him. However, this condition lacks a scienter requirement and must be modified to prohibit the knowing possession or use of dangerous or deadly weapons. We modify the conditions to correct these deficiencies, and affirm the judgment as modified.

## **FACTS**

In March 2013, Daniel M. rode his push scooter to a clothing store in Orange. He parked his scooter outside the store, and then went inside to shop. While Daniel shopped, three young men entered the store. One of them asked Daniel, “Where are you from?” Daniel understood the question to be a method of identifying his criminal street gang affiliation, and he said, “No, I don’t bang[,]” meaning he was not a member of any gang. The other person then said, “I am Rascal from OVC [Orange Varrio Cypress]. Let’s take it outside and I am going to beat you up.” He also said, “Fuck Nalgas, which [was] disrespectful to the criminal street gang OCC [Orange County Criminals].”

Daniel refused to go outside, and the three young men left the store. Daniel waited about five minutes before going outside. When he did venture out, Daniel realized his scooter was gone. Although Daniel did not recognize the man who identified himself as Rascal from OVC, he recognized Michael and the other young man because they had all attended Orange High School.

Daniel admitted he associated with OCC, and he testified OVC and OCC were rival gangs. Although Daniel did not immediately contact police, he later told his probation officer about the theft and gave a statement to an Orange police officer.

The prosecution's gang expert testified OVC and OCC were criminal street gangs and rivals. The expert was familiar with Michael, and he testified that Michael was an active participant in OVC. The expert further explained OVC claims territory around old town Orange, and the primary activities of the gang included aggravated assault, vehicle theft, narcotics, and weapons sales. The expert opined there had been a gang "hit up," executed with "backup" from other gang members and a gang-related theft. Based on a hypothetical mirroring the facts of the crime, the expert also testified the confrontation in the store and theft of Daniel's scooter was for the benefit of or in association with members of OVC.

## **DISCUSSION**

The instant crimes were the basis of a fifth petition to have Michael declared a ward of the court. After reaching a plea agreement to resolve petitions one through three, the juvenile court ordered probation with various terms and conditions, including the two challenged on appeal. In connection with the instant crimes, the court reinstated all prior terms and conditions of probation.

Although Michael did not object to the challenged conditions, his contention is cognizable on appeal because it presents a pure question of law that may be resolved without reference to the sentencing record. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887-888 (*Sheena K.*); *People v. Kim* (2011) 193 Cal.App.4th 836, 842.)

Welfare and Institutions Code section 730, subdivision (b) provides, “[w]hen a ward . . . is placed under the supervision of the probation officer or committed to the care, custody, and control of the probation officer, the court may . . . impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.”

Cases have recognized juvenile courts have broad discretion in selecting and imposing juvenile probation conditions. (*Sheena K.*, *supra*, 40 Cal.4th at p. 889; *In re Victor L.* (2010) 182 Cal.App.4th 902, 910.) “However, a juvenile court’s discretion to impose conditions of probation is not boundless, and a probation condition must not violate a probationer’s inalienable rights.” (*In re R.P.* (2009) 176 Cal.App.4th 562, 566 (*R.P.*).

As noted, Michael claims the conditions at issue are constitutionally infirm because they are either too vague or overbroad. “[T]he underpinning of a vagueness challenge is the due process concept of ‘fair warning.’ [Citation.] The rule of fair warning consists of ‘the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders’ [citation] . . . .” (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) “[T]he overbreadth doctrine requires that conditions of probation that impinge on constitutional rights must be tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation. [Citations.]” (*In re Victor L.*, *supra*, 182 Cal.App.4th at p. 910.)

Michael argues the condition stating he may not “use or possess any dangerous, illegal or deadly weapons” is vague unless modified to include a reference to his intent to use an object as a deadly weapon because the condition as is fails to adequately identify what dangerous or deadly weapons he is forbidden to use or possess. He acknowledges the court in *R.P.*, *supra*, 176 Cal.App.4th 562 came to a contrary conclusion, but argues *R.P.*, was wrongly decided. We disagree.

In *R.P.*, *supra*, 176 Cal.App.4th at pages 566 through 568, the appellate court upheld a juvenile probation condition prohibiting possession of any “‘dangerous or deadly weapon’” against a challenge that it was unconstitutionally vague. The court cited the definitions of a deadly or dangerous weapon in statutes, case law, jury instructions, and Black’s Law Dictionary, and concluded, the “legal definitions of ‘deadly or dangerous weapon,’ ‘deadly weapon,’ ‘dangerous weapon,’ and use in a ‘dangerous or deadly’ manner, consistently include the harmful capability of the item and the intent of its user to inflict, or threaten to inflict, great bodily injury. As a result of these well-defined terms, the phrase ‘dangerous or deadly weapon’ is clearly established in the law. Accordingly, the ‘no-dangerous-or-deadly-weapon’ probation condition is sufficiently precise for [the minor] to know what is required of him.” (*Id.* at p. 568.) The term “illegal” is self-evident. Thus, Michael’s claim fails.

However, the condition does lack a scienter requirement in that it fails to specify minor must knowingly possess such a weapon. (*Sheena K.*, *supra*, 40 Cal.4th at p. 892.) Consequently, the weapons condition must be modified to state, “Minor not to *knowingly* use or possess any dangerous, illegal, or deadly weapons or knowingly be in the presence of any illegally armed person.” (Italics added.)

With respect to the other contested condition, the Attorney General concedes prohibiting direct or indirect contact with “‘the victims or witnesses of any other offense alleged against you’” is vague and overbroad because it fails to put Michael on notice of the persons he is prohibited from contacting. We agree.

The Attorney General suggests the proper remedy for these errors is modification of the probation conditions to include a scienter requirement, relying on *Sheena K.*, *supra*, 40 Cal.4th at page 892. Michael contends the trial court is in the best position to modify the conditions, thus allowing him to provide input as to the specific language used. However, he offers no case law to support this proposition, and we are

persuaded by the *Sheena K.*, court's approval of modification by the appellate court. (See *id.* at p. 892.)

### **DISPOSITION**

The probation condition declaring "Minor not to initiate contact or cause to be contacted by any means with the victims or witnesses of any offense alleged against you," is modified to state "Minor not to knowingly initiate contact or cause to be contacted by any means with the victims or witnesses of any offense alleged against you." The probation condition declaring "Minor not to use or possess any dangerous, illegal or deadly weapons or knowingly be in the presence of any illegally armed person," is modified to state "Minor not to knowingly use or possess any dangerous, illegal or deadly weapons or knowingly be in the presence of any illegally armed person." As modified, the judgment is affirmed.

THOMPSON, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J.